

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JOSE RAMIREZ-SALGADO,

Petitioner,

vs.

LARRY E. SCRIBNER, Warden, et al.,

Respondents.

Civil No. 08-0562 WQH (WMc)

**REPORT AND RECOMMENDATION
RE: DENIAL OF PETITION FOR WRIT
OF HABEAS CORPUS**

I. INTRODUCTION

Jose Ramirez-Salgado (“Salgado”) is a California prisoner serving a sentence of twenty years to life, with the possibility of parole, for second degree murder, robbery, assault with a deadly weapon and use of a firearm. He has filed a First Amended Petition (“FAP”) for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 challenging the November 1, 2005 decision by the California Board of Parole Hearings (“BPH”) denying him parole. This Court has reviewed the Petition, Respondents’ Answer, the Traverse, and all supporting documents. After a thorough review of the record, the Court finds that Petitioner is not entitled to the relief requested and **RECOMMENDS** that the Petition be **DENIED**.

II. FACTUAL AND PROCEDURAL BACKGROUND

The facts are taken from the BPH’s summary during the 2005 parole hearing. On June 16, 1979, Salgado approached Sidney Pierce and Matthew Foster while they were walking on Wilson Avenue. (See Lodgment No. 2, Exh. 1 at 11.) He robbed them at gunpoint and told them to start running. When they did, he fired his gun several times at them. (*Id.*) Pierce was struck in the neck. Salgado and the

1 victims ran down an alley where Salgado fired more shots. (*Id.*) A vehicle driven by a Mr. Holley, and
2 in which Holley's son was a passenger, entered the alley. Salgado pounded on the car, fired three shots
3 at them but missed. (*Id.*) Salgado then ran further down the alley. Victim Lang came out of his house
4 to investigate and was shot and killed by Salgado. (*Id.*) Salgado continued running down the alley and
5 encountered victim McCloud. Salgado robbed McCloud at gunpoint, then told him to run. (*Id.* at 12.)
6 McCloud heard a shot, turned around, and started walking back toward Salgado. Salgado then ran,
7 firing another shot. (*Id.*)

8 Salgado was arrested the next day. (*Id.*) He pleaded guilty to second degree murder, robbery
9 and assault with a deadly weapon. (Lodgment No. 3 at 1.) He was sentenced to an indeterminate term
10 of twenty years to life. (*Id.*)

11 On November 1, 2005, the BPH held a parole hearing for Salgado. (Lodgment No. 2.) After
12 hearing from Salgado, Deputy District Attorney A. Rodriguez, and Linda Ludwig, Salgado's attorney
13 and reviewing the documents related to Salgado's case, the BPH denied him parole. (*Id.* at 25-30.)

14 Salgado filed a Petition for writ of habeas corpus challenging the BPH's denial in the San Diego
15 Superior Court, which issued a written, unpublished opinion denying the Petition. (Lodgment Nos. 2,
16 3.) He filed a habeas corpus Petition in the California appellate court, which also denied the Petition
17 in a written, unpublished decision. (Lodgment Nos. 4, 5.) Finally, he filed a habeas corpus Petition in
18 the California Supreme Court, which denied the Petition without citation of authority. (Lodgment Nos.
19 6, 7.)

20 **III. DISCUSSION**

21 **A. Standard of Review**

22 This Petition is governed by the provisions of the Antiterrorism and Effective Death Penalty Act
23 of 1996 ("AEDPA"). *See Lindh v. Murphy*, 521 U.S. 320 (1997); *see also Redd v. McGrath*, 343 F.3d
24 1077, 1080 n.4 (9th Cir. 2003) (provisions of AEDPA apply when state prisoner challenges
25 constitutionality of state administrative decision, such as denial of parole); *Sass v. California Board of*
26 *Prison Terms*, 461 F.3d 1123, 1126-27 (9th Cir. 2006). Under AEDPA, a habeas petition will not be
27 granted with respect to any claim adjudicated on the merits by the state court unless that adjudication:
28 (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly

1 established federal law; or (2) resulted in a decision that was based on an unreasonable determination
2 of the facts in light of the evidence presented at the state court proceeding. 28 U.S.C. § 2254(d); *Early*
3 *v. Packer*, 537 U.S. 3, 8 (2002). In deciding a state prisoner’s habeas petition, a federal court is not
4 called upon to decide whether it agrees with the state court’s determination; rather, the court applies an
5 extraordinarily deferential review, inquiring only whether the state court’s decision was objectively
6 unreasonable. *Yarborough v. Gentry*, 540 U.S. 1, 4 (2003); *Medina v. Hornung*, 386 F.3d 872, 877 (9th
7 Cir. 2004). Additionally, the state court’s factual determinations are presumed correct, and Salgado
8 carries the burden of rebutting this presumption with “clear and convincing evidence.” 28 U.S.C.A.
9 § 2254(e)(1) (West 2007).

10 A federal habeas court may grant relief under the “contrary to” clause if the state court applied
11 a rule different from the governing law set forth in Supreme Court cases, or if it decided a case
12 differently than the Supreme Court on a set of materially indistinguishable facts. *Bell v. Cone*, 535 U.S.
13 685, 694 (2002). The court may grant relief under the “unreasonable application” clause if the state
14 court correctly identified the governing legal principle from Supreme Court decisions but unreasonably
15 applied those decisions to the facts of a particular case. *Id.* Additionally, the “unreasonable application”
16 clause requires that the state court decision be more than incorrect or erroneous; to warrant habeas relief,
17 the state court’s application of clearly established federal law must be “objectively unreasonable.”
18 *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003).

19 Where there is no reasoned decision from the state’s highest court, the Court “looks through”
20 to the underlying appellate court decision. *Ylst v. Nunnemaker*, 501 U.S. 797, 801-06 (1991). If the
21 dispositive state court order does not “furnish a basis for its reasoning,” federal habeas courts must
22 conduct an independent review of the record to determine whether the state court’s decision is contrary
23 to, or an unreasonable application of, clearly established Supreme Court law. *See Delgado v. Lewis*, 223
24 F.3d 976, 982 (9th Cir. 2000) (overruled on other grounds by *Lockyer*, 538 U.S. at 75-76); *accord Himes*
25 *v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003). However, a state court need not cite Supreme Court
26 precedent when resolving a habeas corpus claim. *Early v. Packer*, 537 U.S. 3, 8 (2002). “[S]o long as
27 neither the reasoning nor the result of the state-court decision contradicts [Supreme Court precedent,]”
28 *id.*, the state court decision will not be “contrary to” clearly established federal law. *Id.* Clearly

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2 established federal law, for purposes of § 2254(d), means “the governing principle or principles set forth
3 by the Supreme Court at the time the state court renders its decision.” *Lockyer*, 538 U.S. at 72.

4 B. *Analysis*

5 In his petition, Salgado raises three claims.¹ First, he argues the denial of parole violated his
6 federal rights to due process and equal protection because the BPH relied on the unchanging facts of the
7 offenses and because the BPH’s conclusions were not supported by sufficient facts. (FAP at 7.) Second,
8 he argues that the attorney who represented him at his parole hearing rendered constitutionally
9 ineffective assistance. (FAP at 8.) Third, he claims the state has violated his plea bargain by using facts
10 which were not adjudicated in court to support his denial of parole. (FAP at 10.) Respondent counters
11 that Salgado has not established the state court’s decision denying Salgado’s claims were neither
12 contrary to, nor an unreasonable application of, clearly established Supreme Court law. Respondent also
13 contends Salgado has not shown the state court’s decision was based on an unreasonable determination
14 of the facts. (Mem. P. & A. Supp. Answer at 1-7.)

15 1. *Improper Denial of Parole/Unreasonable Determination of the Facts*

16 Under clearly established Supreme Court law, Salgado’s due process claim is analyzed in two
17 parts. First, the Court must determine whether Salgado has a liberty interest of which he has been
18 deprived. *Kentucky Dep’t of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). If so, the Court must
19 determine whether the procedure used to deprive him of that liberty interest was constitutionally
20 sufficient. *Id.* Respondent argues that the only clearly established Supreme Court law under which
21 Salgado’s due process claim can be analyzed is *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*,
22 442 U.S. 1 (1979). In *Greenholtz*, the Supreme Court held that there is “no constitutional or inherent
23 right of a convicted person to be conditionally released before the expiration of a valid sentence,” but
24 acknowledged that a state can create “a liberty interest protected by due process guarantees” when its
25 parole scheme employs “statutory language [that] itself creates a protectible interest in parole “

27 ¹ Salgado’s petition actually contains five claims. Claims two and four, however, state essentially the
28 same claim. In addition, claim one argues that the state court’s factual findings are not entitled to a presumption
of correctness, which the Court construes as an allegation that the state court’s denial of his claims was based on
an unreasonable determination of the facts.

1 *Greenholtz*, 442 U.S. at 11-12. Under *Greenholtz*, due process requires only that a prisoner be given
2 an opportunity to be heard and reasons for the decision to deny parole. *Greenholtz*, 442 U.S. at 7, 16.
3 Respondent contends that because Salgado received a parole hearing and was provided with the reasons
4 for the denial, he has received all the process he was due under *Greenholtz*. (Mem. P. & A. Supp.
5 Answer at 1-3.)

6 The Ninth Circuit has repeatedly held that California's parole scheme, codified in California
7 Penal Code section 3041, vests all "prisoners whose sentences provide for the possibility of parole with
8 a constitutionally protected liberty interest in the receipt of a parole release date, a liberty interest that
9 is protected by the procedural safeguards of the Due Process Clause." *Irons v. Carey*, 479 F.3d 658, 662
10 (9th Cir. 2007) (citing *Sass v. Calif. Bd. of Prison Terms*, 461 F.3d 1123, 1128 (9th Cir. 2006); *Biggs*
11 *v. Terhune*, 334 F.3d 910, 914 (9th Cir. 2003); *McQuillon v. Duncan*, 306 F.3d 895, 903 (9th Cir.
12 2002)); see also *Duhaime v. Ducharme*, 200 F.3d 597, 600 (9th Cir. 2000) (finding that Ninth Circuit
13 "cases may be persuasive authority for purposes of determining whether a particular state court decision
14 is an 'unreasonable application' of Supreme Court law, and also may help us determine what law is
15 'clearly established'"). Having determined Salgado does have a protected liberty interest in a parole
16 date, the Court must proceed to the second, more contentious prong of the due process analysis: whether
17 the procedure afforded Salgado was adequate. *Thompson*, 490 U.S. at 460.

18 The Ninth Circuit has concluded the Supreme Court's decision in *Superintendent, Mass. Corr.*
19 *Inst. v. Hill*, 472 U.S. 445, 454 (1985), which held that "revocation of good time [credits] does not
20 comport with 'the minimum requirements of procedural due process,' unless the findings of the prison
21 disciplinary board are supported by some evidence in the record," *Hill*, 472 U.S. at 454, applies with
22 equal force to the denial of parole "because both directly affect the duration of the prison term." See
23 *Sass*, 461 F.3d at 1128-29 (quoting *Jancsek v. Oregon Bd. of Parole*, 833 F.3d 1389, 1390 (9th Cir.
24 1987). The court further held that the "some evidence" standard was clearly established Supreme Court
25 law for AEDPA purposes. See *id.*, 461 F.3d at 1129; see also *Duhaime*, 200 F.3d at 600.

26 Respondent argues this Court is not bound by the "some evidence" rule because it is neither
27 clearly established Supreme Court law nor did the Ninth Circuit base its decision on clearly established
28 Supreme Court law. (Mem. of P. & A. in Supp. of Answer at 6.) Contrary to Respondent's suggestion,

1 this Court is bound by Ninth Circuit authority. Accordingly, the Court recommends rejecting this
 2 argument. The Court will conduct the due process analysis under the “some evidence” standard as
 3 delineated by *Sass*:

4 To determine whether the some evidence standard is met, “does not require examination
 5 of the entire record, independent assessment of the credibility of witnesses, or weighing
 6 of evidence. Instead, the relevant question is whether there is any evidence in the record
 7 that could support the conclusion reached by [the parole board or the governor]
Hill’s some evidence standard is minimal, and assures that “the record is not so devoid
 of evidence that the findings of the [parole board or governor] were without support or
 otherwise arbitrary.”

8 *Sass*, 461 F.3d at 1128-29 (quoting *Hill*, 472 U.S. at 455-57.); *see also Irons*, 479 F.3d 658.

9 When determining whether “some evidence” supports a denial of parole, “[the] analysis is
 10 framed by the statutes and regulations governing parole suitability determinations in the relevant state.”
 11 *Irons*, 479 F.3d at 662. Thus, the Court “must look to California law to determine the findings that are
 12 necessary to deem a prisoner unsuitable for parole.” *Id.* The Court must then “determine whether the
 13 state court decision holding that these findings were supported by ‘some evidence’ . . . constituted an
 14 unreasonable application of the ‘some evidence’ principle articulated in *Hill*, 472 U.S. at 454 [citation
 15 omitted].” *Id.*

16 California prescribes indeterminate sentences for non-capital murders: twenty-five years-to-life
 17 for first degree murder and fifteen years-to-life for second degree murder. Cal. Penal Code § 190. One
 18 year prior to the expiration of a prisoner’s minimum sentence, a BPH panel meets with the inmate and
 19 “set(s) a release date unless it determines that the gravity of current convicted offense or offenses, or
 20 the timing and gravity of current or past convicted offense or offenses, is such that consideration of the
 21 public safety requires a more lengthy incarceration.” Cal. Penal Code § 3401(a). The criteria for
 22 determining parole suitability are found in the California Codes of Regulations, Title 15, § 2401(a) and
 23 (b) (2008). Regardless of the length of time served, “a life prisoner shall be found unsuitable for and
 24 denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to
 25 society if released from prison.” 15 Cal. Code Regs. § 2402(a). California’s parole scheme requires that
 26 the BPH have “some evidence” that the inmate will be a continuing threat to society in order to deny
 27 parole. *See In re Dannenberg*, 34 Cal.4th 1061, 1095 (2005). Section 2402(b) states “[a]ll relevant

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2 reliable information available to the panel shall be considered in determining suitability for parole.” 15

3 Cal. Code Regs. § 2402(b). This includes:

4 the circumstances of the prisoner’s social history; past and present mental state; past
5 criminal history, including involvement in other criminal misconduct which is reliably
6 documented; the base and other commitment offenses, including behavior before, during
7 and after the crime; past and present attitude toward the crime; any conditions of
8 treatment or control, including the use of special conditions under which the prisoner
may safely be released to the community; and any other information which bears on the
prisoner’s suitability for release. Circumstances which taken alone may not firmly
establish unsuitability for parole may contribute to a pattern which results in a finding
of unsuitability.

9 15 Cal. Code Regs. § 2402(b).

10 At the November 1, 2005 parole hearing, the BPH articulated the following reasons for denying
11 parole to Salgado:

12 COMMISSIONER SALDAMANDO: The panel has reviewed the information
13 received from the public and relied on the following circumstances in concluding
14 prisoner is not suitable for parole, and would pose an unreasonable risk to society and
15 threat to public safety if released from prison. The offense was carried out in a cruel and
16 callous manner[,] there were multiple victims that were attacked and killed. The offense
17 was carried out in a dispassionate and calculated manner[,] the offense was carried out
18 in a manner which demonstrates exceptionally callous disregard for human suffering.
19 The motive for the crime was inexplicable. You shot and killed one person, you shot
20 another person during this one series of attacks. The prisoner has [on] previous
21 occasions inflicted or [attempted] to inflict serious injuries on victims. The prisoner has
22 a record of violence[,] the prisoner has an escalating pattern of criminal conduct and
23 violence. He also has a history of unstable relationships with others. The prisoner has
24 programmed in a limited manner while incarcerated. He failed to develop a marketable
25 skill that he can put to use when released. He has failed to upgrade his vocational skills.
26 He has not sufficiently participated in beneficial self-help or therapy programs. He has
27 failed to develop evidence of positive change in that he has received five 128's and 27
28 115's[,] the latest as of April 6, 2004. And he continues to display negative behavior
while incarcerated. The prisoner lacks realistic parole plans in [that] he does not have
a marketable skill. The panel makes the following findings. The prisoner needs therapy
in order to face, discuss, understand and cope with stress in a nondestructive manner[.
U]ntil progress is made the prisoner continues to be unpredictable and a threat to others.
Therapy in a controlled setting but motivation is questionable [sic]. In view of the
prisoner’s assaultive history, continued negative behavior and lack of program
participation, there is no indication that the prisoner would behave differently if paroled.
In a separate decision the hearing panel finds that the prisoner has been convicted of
murder and it is not reasonable to expect that the parolee would be granted at a hearing
during the next five years. Multiple victims were attacked and killed in separate
incidents. The offense was carried out in a dispassionate calculated manner[,] again the
offense was carried out in a manner which demonstrates exceptional callous disregard
for human suffering. The motive for the crime was inexplicable. The prisoner has a
record of violent behavior in that the prisoner again has 27 115's and five 128's. The
prisoner has a history of unstable relationships with others[,] a recent psychiatric report
dated January 23, 2002 authored by John R. Bellinger PhD. Indicates a need for a longer
period of observation and evaluation and treatment. The panel recommends that the

prisoner become and remain disciplinary free, work toward reducing his custody level, so that program opportunities will become more available. If available upgrade his vocational skills[;] if available, participate in self-help and therapy programs. And cooperate with clinicians in a complete clinical evaluation. Commissioner do you have anything to say?

PRESIDING COMMISSIONER LEE: Well sir you have a very, very high classification score. Until you get your classification score [down] you cannot expect getting a date. So you are going to have to work at it.

COMMISSIONER SALDAMANDO: Deputy Commissioner?

DEPUTY COMMISSIONER ARMENTA: From 1980 to 1983 you got 19 115's. You dug your hole very deep and it is going to take a while to get out of it. And every year that you don't get a 115 you at least earn eight points and that's what you get.

(Lodgment No. 2, Exh. 1 at 27-30.)

Salgado claims the BPH's reasons for denying him parole were insufficient for a number of reasons. First, he claims the BPH's reliance on the circumstances of the offenses is contrary to California law and thus violates his federal due process rights. (FAP at 20-22, 25-6, 29-31.) Second, he argues the BPH's determination that he did not have realistic parole plans was without support in the record. Salgado plans to return to Mexico and use money left to him by his mother and property left to him by the grandfather to operate a farm. (*Id.* at 26-27; *see also* Lodgment No. 2, Exh. 1 at 16-18.) Third, he contends the BPH improperly based its parole denial on Salgado's failure to obtain sufficient vocational training. Salgado claims he is unable to do so because he has epilepsy and is barred from participating in vocational training. (FAP at 28.) Fourth, he argues the BPH's improperly relied on his past unstable relationships (*Id.* at 31-33) Finally, he claims the BPH's reliance on facts not encompassed by his plea violates states and federal law. (*Id.* at 33-37.)

The last reasoned decision to address Salgado's claims, to which this Court must look as the basis for its analysis, is the state appellate court's opinion denying Salgado's habeas corpus petition. *See Ylst*, 501 U.S. at 801-06. That court wrote:

Jose Ramirez-Salgado is serving a prison sentence of 20 years to life after pleading guilty in 1979 to second degree murder, robbery and assault with a deadly weapon, and admitting he was personally armed with a firearm when he committed the offenses. On November 1, 2005, the Board of Parole Hearings (Board) held a hearing and declined to set a parole date, finding Ramirez-Salgado would pose an unreasonable risk to society or public safety if released. The Board based its decision on the cruel and callous nature of the offense, finding multiple victims were attacked or killed and the motive for the crime was inexplicable or trivial compared to the offense. The Board

1 further found Ramirez-Salgado has a record of violence, and escalating pattern of
2 criminal conduct and a history of unstable relationships with others. He has limited
3 prison programming, failed to develop a marketable skill to use when released, failed to
4 upgrade his vocational skills and has not sufficiently participated in beneficial self-help
5 or therapy programs. Further, Ramirez-Salgado failed to show positive changes in that
6 he received 30 disciplinary reports while incarcerated, including two since his last parole
7 hearing.

8 Ramirez-Salgado claims: (1) the Board relied on facts of the crime which were
9 not admitted to him in his plea agreement, not found by the court at the change of plea
10 hearing and not relied on by the prosecution in offering the plea bargain; (2) he received
11 ineffective assistance of counsel before, during and after the suitability hearing because
12 counsel advised him to waive his right to be present at that hearing; (3) the Board's
13 findings he was unsuitable for parole were contrary to the facts, unreasonable and
14 violated his due process rights; and (4) the Board violated his due process rights by
15 punishing him for exercising his legal right to personally appear at his parole suitability
16 hearing and predetermining the outcome of that hearing.

17 The facts of the crime as stated in the Board's 2002 report are: Ramirez-Salgado
18 robbed two men at gunpoint, taking cigarettes and \$6. He told them to run, and as they
19 did so, Ramirez-Salgado fired several shots at them. A bullet hit one of them in the
20 neck. Ramirez-Salgado ran down an alley, firing several more shots. He approached a
21 car occupied by a man and his son, fired several shots, but missed them. When another
22 man came out of his house to investigate, Ramirez-Salgado shot him three times in the
23 chest, fatally wounding him. Ramirez-Salgado approached a sixth victim and, at
24 gunpoint, demanded his wallet. The victim said he had no wallet. Finding no wallet,
25 Ramirez-Salgado told the victim to run and as the victim did so, Ramirez-Salgado fired
26 several shots.

27 Where, as here, a prisoner refuses to discuss the facts of the crime, the Board's
28 decision must be made on other available information. (15 Cal. Code Reg., tit. 15,
§ 2236.) Ramirez-Salgado cites no authority for the proposition that the Board may
consider only facts admitted in the plea agreement, found by the court at the change of
plea hearing or relied on by the prosecution in offering the plea bargain. The Board acted
properly in considering the facts of the commitment offense as presented in the Board's
2002 report.

Ramirez-Salgado claims he received ineffective assistance of counsel because his
attorney tried to prevent him from appearing at the parole hearing. However, Ramirez-
Salgado personally appeared at the parole hearing and thus, any alleged deficiency by
counsel did not prejudice him. (*Strickland v. Washington*, (1984) 466 U.S. 668, 688;
People v. Waddle (2000) 22 Cal.4th 690, 718.)

Ramirez-Salgado contends the Board's unsuitability finding was contrary to the
facts, unreasonable and violated his due process rights. However, the record shows that
in finding Ramirez-Salgado was unsuitable for parole, the Board considered proper facts
in an individualized manner. There is some evidence to support the Board's decision.
(*In re Dannenberg* (1995) 34 Cal.4th 1061, 1084.) Further, Ramirez-Salgado has not
provided a sufficient basis on which to show the Board punished him for exercising his
legal right to personally appear at the parole suitability hearing and predetermined the
outcome of that hearing. (*In re Alvernaz* (1992) 2 Cal.4th 924, 945.)

The petition is denied.

1 (Lodgment No. 5 at 1-3.)

2 a. *Circumstances of the Offense*

3 California law permits the Governor to consider the facts surrounding the commitment offense
4 in determining whether a prisoner is too dangerous to parole. *Dannenberg*, 34 Cal. 4th at 1071.
5 However, as the Ninth Circuit has noted:

6 [T]he denial of parole may be predicated on a prisoner's commitment offense only where
7 the Board can 'point to factors beyond the minimum elements of the crime for which the
8 inmate was committed' that demonstrate the inmate will, at the time of the suitability
9 hearing, present a danger to society if released. *Dannenberg*, 34 Cal. 4th at 1071
10 [citations omitted]. Factors beyond the minimum elements of the crime include, *inter*
11 *alia*, that '[t]he offense was carried out in a dispassionate and calculated manner,' that
12 "[t]he offense was carried out in a manner which demonstrates an exceptionally callous
13 disregard for human suffering," and that "[t]he motive for the crime is inexplicable or
14 very trivial in relation to the offense." Cal. Code Regs., tit. 15 § 2402(c)(1)(B), (D)-(E).

15 *Irons*, 479 F.3d at 663; *see also* *Rosencrantz*, 29 Cal. 4th at 678-79.

16 The Ninth Circuit has suggested in dicta, however, that while the BPH can look at immutable
17 events, such as the nature of the commitment offense, to predict that a prisoner is not currently suitable
18 for parole, in order to comply with federal due process guarantees the weight to be attributed to such
19 events should decrease over time and as the prisoner demonstrates good behavior in prison. *See Biggs*,
20 334 F.3d 910; *Sass*, 461 F.3d 1123; *Irons*, 479 F.3d 658. Indeed, the Court has noted that "in some
21 cases, indefinite detention based solely on an inmate's commitment offense, regardless of the extent of
22 his rehabilitation, will at some point violate due process, given the liberty interest in parole that flows
23 from the relevant California statutes." *Irons*, 479 F.3d at 665.

24 Despite the Ninth Circuit's suggestions, however, "[t]here is no 'clearly established federal law,
25 as determined by the Supreme Court of the United States,' that limits the number of times a parole board
26 may deny parole to a murderer based on the brutality and viciousness of the commitment offense."
27 *Culverson v. Davison*, No. 06-56827, slip op. at 2, 2007 WL 1663682 (9th Cir. June 8, 2007) (quoting
28 28 U.S.C. 2254(d)); *see also* *Kunkler v. Muntz*, No. 06-55555, slip op. at 4-5 (9th Cir. Mar. 7, 2007).²
Accordingly, this Court cannot conclude that the use of Salgado's commitment offense alone to deny
parole entitles him to relief. *See Brewer v. Hall*, 378 F.3d 952, 955 (9th Cir. 2004) (holding that "[i]f

² Unpublished Ninth Circuit decisions may be cited commencing with decisions issued in 2007. (*See* Ninth Cir. Rule 36-3.) Although still not binding precedent, unpublished decisions have persuasive value and indicate how the Ninth Circuit applies binding authority.

1 no Supreme Court precedent creates clearly established federal law relating to the legal issue the habeas
2 petitioner raised in state court, the state court's decision cannot be contrary to or an unreasonable
3 application of clearly established federal law.”) Rather, this Court is limited to determining “whether
4 the state court decision holding that the [Governor’s] findings were supported by ‘some evidence’ . . .
5 constituted an unreasonable application of the ‘some evidence’ principle articulated in *Hill*.” *Irons*, 479
6 F.3d at 662. As previous noted, “*Hill*’s some evidence standard is minimal, and assures that ‘the record
7 is not so devoid of evidence that the findings of the parole board or governor] were without support or
8 otherwise arbitrary.” *Sass*, 461 F.3d at 1128-29.

9 In Salgado’s case, the BPH cited “some evidence” to support the its denial of parole: the crime
10 was carried out in a cruel, callous and dispassionate manner, there were multiple victims, and the motive
11 for the crime was inexplicable. (Lodgment No. 2, Exh. 1 at 27-29; *see also Kunkler*, No 06-55555, slip
12 op. at 4-5 (upholding Governor’s decision to reverse parole grant as supported by “some evidence”
13 where reversal based on the gravity of Kunkler’s offense, namely that it was a second degree murder
14 committed under aggravated circumstances). These reasons were amply supported by the facts of the
15 crime. The record reflects Salgado robbed five individuals at gunpoint and shot at them, seriously
16 injuring one and killing another. (Lodgment No. 2, Exh. 1 at 12.) These facts demonstrate there was
17 time and opportunity for Salgado to reflect upon his actions and the consequences of those actions, and
18 thus that “[t]he offense was carried out in a dispassionate and calculated manner.” *See* Cal. Code Regs.,
19 tit. 15 § 2402(a), (b), (c)(1). Accordingly, the state court’s denial of Salgado’s claim was neither
20 contrary to, nor an unreasonable application of, clearly established Supreme Court law. *Williams*, 529
21 U.S. at 412-13. Moreover, because there was amply factual support in the record to for the BPH’s
22 conclusion, the state court’s decision was not based on an unreasonable determination of the facts. *See*
23 28 U.S.C. § 2254(d)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (stating that in order
24 for a petitioner to satisfy § 2254(d)(2), he must demonstrate that the factual findings upon which the
25 state court’s adjudication rests is objectively unreasonable).

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2 Salgado claims his equal protection rights were also violated by the denial of parole, but does
3 not specifically identify how such a violation occurred. (FAP at 7, 25-26.) The Supreme Court has
4 outlined the appropriate analysis for an equal protection claim:

5 The Equal Protection Clause of the Fourteenth Amendment commands that no State shall
6 deny to any person within its jurisdiction the equal protection of the laws, which is
7 essentially a direction that all persons similarly situated should be treated alike. *Plyler*
8 *v. Doe*, 457 U.S. 202, 216 (1982). . . . The general rule is that legislation is presumed to
9 be valid and will be sustained if the classification drawn by the statute is rationally
10 related to a legitimate state interest. [citations omitted]. . . . The general rule gives way,
11 however, when a statute classifies by race, alienage, or national origin. These factors are
so seldom relevant to the achievement of any legitimate state interest that laws grounded
in such considerations are deemed to reflect prejudice and antipathy — a view that those
in the burdened class are not as worthy or deserving as others. For these reasons and
because such discrimination is unlikely to be soon rectified by legislative means, these
laws are subjected to strict scrutiny and will be sustained only if they are suitably
tailored to serve a compelling state interest. [citations omitted].

12 *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

13 Salgado has not established how he was treated differently from similarly situated individuals.
14 Because he provides no factual basis for this claim, he is not entitled to relief. *See James v. Borg*, 24
15 F.3d 20, 26 (9th Cir. 1994) (stating that “[c]onclusory allegations which are not supported by a statement
16 of specific facts do not warrant habeas relief”).

17 b. *Lack of Realistic Parole Plans*

18 Salgado also claims the Board improperly based his parole denial in part on the fact he did have
19 realistic parole plans, did not have acceptable employment plans and did not have a marketable skill.
20 (FAP at 7, 26-27; Lodgment 2, Exh. 1 at 28.) At his hearing, Salgado stated that his first plan had been
21 to return to Tijuana to start a business using money gained from the sale of land given to him by his
22 grandfather. (Lodgment No. 2, Exh. 1 at 17.) Salgado stated that because the BPH was concerned about
23 him being paroled in Tijuana, he now plans to re-start his grandfather’s farm in Mexico using the land
24 left to him by his grandfather and money (\$50,000) left to him by his mother in a trust fund. (FAP at
25 26-27.) Salgado argues the BPH’s determination that these plans were unrealistic was arbitrary and
26 without support in the record. Respondent argues that the state court’s denial of this claim is neither
27 contrary to, nor an unreasonable application of, clearly established Supreme Court law. (Mem. of P.
28 & A. in Supp. of Answer at 4-6.)

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2 The applicable California regulations require the prisoner to make “realistic plans for release”
 3 or have “developed marketable skills that can be put to use upon parole.” 15 Cal. Code Reg.
 4 § 2402(d)(8). Certainly there is “some evidence” to support the BPH’s determination that Salgado’s
 5 plan to re-start his grandfather’s farm was not realistic. He presented evidence that he owned his
 6 grandfather’s property in Mexico via a certified copy of Mexican document which stated he was the sole
 7 heir to his grandfather’s property. (Lodgment No. 2, Exh. 6 at.10) He did not present any evidence of
 8 the fifty thousand dollar trust fund he claimed his mother left him, however. He simply presented a
 9 letter from his sister Felipa Martinez stating she was keeping a bank account their mother had started
 10 for Salgado but that it is in Martinez’s name. (*Id.* at 8.) She did not state how much money was in the
 11 account. (*Id.*) Further, the letters submitted by Salgado in support of his parole do not support his
 12 parole plan of returning to his grandfather’s property and restarting the ranch. Rather, they reflect a job
 13 offer, a promise of a place to live and support for him when he returns to Tijuana. (*Id.* at 4, 7-9.)
 14 Finally, Salgado did not present any evidence establishing that he had the skills and experience to
 15 successfully re-start the farm. (*See* Lodgment No. 2, Exhs. 4-6.) Under these circumstances, it was
 16 certainly within the BPH’s power and discretion to conclude that Salgado had not presented enough
 17 evidence to demonstrate that returning to Mexico and running a farm was realistic and there was ample
 18 factual support for such a conclusion. Accordingly, the state court’s denial of this claim was neither
 19 contrary to, nor an unreasonable application of, clearly established Supreme Court law, nor was it an
 20 unreasonable determination of the facts. *See Williams*, 529 U.S. at 412-13; 28 U.S.C. § 2254(d)(2).

21 c. *Failure to Obtain Sufficient Vocational Training*

22 Salgado also complains the BPH cited his failure to obtain sufficient vocational training as a
 23 reason for denying parole despite the fact he is barred from participating in many such programs due
 24 to his epilepsy. (FAP at 28.) The only evidence in the record which supports Salgado’s claim he is
 25 unable to obtain further vocational training is his and his attorney’s statements to that effect. (FAP at
 26 28; Lodgment No. 2, Ex. 1 at 24.) Salgado has not provided the Court with any citations to regulations
 27 which prevent him from participating nor has he provided any documentation the prison authorities have
 28 declined his requests to participate in vocational training on the basis of his epilepsy. Without any

1 factual basis for this claim, the Court is unable to conclude that the BPH's reliance on Salgado's failure
 2 to obtain sufficient vocational training pursuant to California Code of Regulations, title 15 § 2402(d)(8)
 3 as one of the factors making him unsuitable for parole was not based on "some evidence" or that the
 4 decision was an unreasonable determination of the facts. *See James v. Borg*, 24 F.3d 20, 26 (9th Cir.
 5 1994) (stating that "[c]onclusory allegations which are not supported by a statement of specific facts do
 6 not warrant habeas relief"). Accordingly, the state court's denial of this claim was neither contrary to,
 7 nor an unreasonable application of, clearly established Supreme Court law. *Williams*, 529 U.S. at 412-
 8 13.

9 d. *Past Unstable Relationships*

10 Next, Salgado contends the BPH improperly relied on his past unstable relationships with his
 11 family and girlfriend as a factor in denying him parole. (FAP at 31-33.) This is a permissible factor
 12 under the applicable California law, Cal. Code Regs., tit. 15 § 2402(c)(3). It is not clear what
 13 relationships the board was referring to when it stated that one of the reasons for the denial was
 14 Salgado's "history of unstable relationship with others." (Lodgment No. 2, Exh. 1 at 27.) According
 15 to Salgado himself, however, his mother left him in the care of his grandfather in Mexico when he was
 16 eleven years old while she traveled to the United States. (Lodgment No. 2, Ex. 2 at 9-11.) When he was
 17 twelve, he ran away from home and traveled to Tijuana, living on the streets until he could get across
 18 the border to find his mother. (*Id.*) He sold and used drugs while there. Eventually, he made his way
 19 to San Diego and located his mother, who he found living with her boyfriend (Salgado's father had died
 20 when he was nine). (*Id.*) He had a conflicted relationship with his mother and her boyfriend and began
 21 to hang out with gang members, drinking alcohol and using drugs. (*Id.*) During this time he also
 22 fathered a child. His girlfriend's father took the girlfriend and the child away and Salgado has had no
 23 contact with them. (Lodgment No. 2, Ex. 1 at 8.) This is certainly "some evidence" of Salgado's
 24 various past unstable relationships and an appropriate basis for BPH's denial of parole under California
 25 law. *See* Cal. Code Regs., tit. 15 § 2402(d)(3). Accordingly, the state court's denial of this claim was
 26 neither contrary to, nor an unreasonable application of, clearly established Supreme Court law, nor an
 27 unreasonable determination of the facts. *Williams*, 529 U.S. at 412-13; 28 U.S.C. § 2254(d)(2).

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2 e. *Use of Facts Not Encompassed by His Plea Agreement*

3 Finally, Salgado complains the BPH improperly used facts that were not encompassed by his
4 plea agreement to deny him parole. (FAP at 33-36.) In support of this argument, he cites *Apprendi v.*
5 *New Jersey*, 530 U.S. 466 (2000) and related cases which stand for the proposition that any fact which
6 increases a defendant's sentence beyond the statutory maximum must be admitted or found by a jury
7 beyond a reasonable doubt. (*Id.*) He contends that because the facts relied on by the BPH were not
8 found by a jury or admitted by him, they cannot support his denial of parole. (*Id.*)

9 In a series of cases beginning with *Apprendi*, the Supreme Court has concluded that "the Federal
10 Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a
11 sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury
12 or admitted by the defendant." *Cunningham v. California*, 549 U.S. 270, 275, citing *Apprendi v. New*
13 *Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002); *Blakely v. Washington*, 542 U.S.
14 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005). The high Court has defined "statutory
15 maximum" as "the maximum [a judge] may impose without any additional findings." *Id.*.

16 First, there is no clearly established Supreme Court law which applies the principles of *Apprendi*
17 and its progeny to the use of facts to deny parole. In the absence of such authority, the state court's
18 denial of this claim cannot be said to be contrary to or an unreasonable application of clearly established
19 Supreme Court law. *See Carey v. Musladin*, 549 U.S. 70, 76-77 (2006). Moreover, the statutory
20 maximum in Salgado's case is life. By denying him parole before his life term has been completed, the
21 BPH has not extended his "maximum term." Accordingly, the state court's denial of this claim was
22 neither contrary to, nor an unreasonable application of, clearly established Supreme Court law.
23 *Williams*, 529 U.S. at 412-13.

24 2. *Ineffective Assistance of Counsel*

25 Salgado contends counsel was ineffective in representing him before the BPH. (FAP at 38-41.)
26 Specifically, Salgado contends counsel improperly urged him to sign a waiver of hearing because,
27 according to her, the BPH had already decided Salgado was unsuitable for parole. If Salgado signed
28 the waiver, he would be eligible for a new hearing in two years. If he did not, the BPH would set

1 another hearing in five years. (FAP at 38-39.) In addition, Salgado claims counsel refused to file
2 motions, including a request for a pre-Board audit which would have required updated psychological
3 and custody reports, and refused to prepare for the hearing. (*Id.*)

4 Salgado's claim fails because the U.S. Constitution does not afford a right to counsel in the
5 context of parole board hearings. "[T]he protections of the Sixth Amendment right to counsel do not
6 extend to either state collateral proceedings or federal habeas corpus proceedings." *Bonin v. Vasquez*,
7 999 F.2d 425, 430 (9th Cir.1993); *see also Pedro v. Oregon Parole Bd.*, 825 F.2d 1396, 1399 (9th Cir.
8 1987) (stating that "since the setting of a minimum term is not part of the criminal prosecution, the full
9 panoply of rights due a defendant in such a proceeding is not constitutionally mandated . . ."); *Dorado*
10 *v. Kerr*, 454 F.2d 892, 897 (9th Cir. 1972) (stating that "due process does not entitle California state
11 prisoners to counsel at . . . sessions called to determine, administratively, the length of imprisonment,
12 and to grant or deny parole").

13 Even if Salgado had a right to the effective assistance of counsel at his parole hearing, Salgado
14 has not established he was denied that right. Under the applicable law, Salgado must first show his trial
15 counsel's performance fell below an objective standard of reasonableness. *Strickland v. Washington*,
16 466 U.S.668, 687 (1984). "This requires a showing that counsel made errors so serious that counsel was
17 not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Judicial
18 scrutiny of counsel's performance must be "highly deferential." *Id.* at 689. Second, he must show
19 counsel's deficient performance prejudiced the defense. *Id.* at 687. This requires a showing that
20 counsel's errors were so serious they deprived Salgado "of a fair [hearing], a [hearing] whose result is
21 reliable." *Id.* To satisfy the prejudice prong, Salgado must demonstrate a reasonable probability that
22 the result of the proceeding would have been different absent the error. *Id.* at 694. "A reasonable
23 probability is a probability sufficient to undermine confidence in the outcome." *Id.*

24 With regard to Salgado's first allegation, counsel's advice to Salgado to sign the waiver form
25 in order to ensure his next parole hearing would occur in two years rather than the five years the BPH
26 had indicated after a preliminary review of Salgado's file was reasonable and well within counsel's
27 strategic decision making powers. Counsel likely determined that no matter what they heard at the
28 hearing, the BPH would deny Salgado parole and it was in Salgado's best interest to secure a sooner

1 future parole date. *See id.* at 687-89. With regard to Salgado's second allegation, he has not established
 2 prejudice as required by *Strickland* because he has not shown that the BPH would have granted him
 3 parole had counsel filed motions and insisted on updated psychological and custody reports. *Id.* at 689.
 4 Thus, Salgado has not established that the state court's denial of this claim was contrary to, or an
 5 unreasonable application of, clearly established Supreme Court law. *Williams*, 529 U.S. at 412-13.

6 3. Violation of the Plea Bargain

7 Salgado contends the BPH's denial of parole breached the terms of his plea agreement because
 8 it deprives him of the benefit of his plea bargain. Specifically, Salgado argues the BPH has re-cast his
 9 conviction as a first degree murder even though he pleaded guilty to second degree murder. (FAP 42-
 10 48.) Respondent counters Salgado has not established there is any clearly established Supreme Court
 11 law that states a parole board must consider only facts contained in the plea agreement, and that cases
 12 Salgado cites which state that a jury must find every element of the offense upon which his sentence is
 13 based beyond a reasonable doubt are inapplicable to the parole setting. (Mem. P. & A. Supp. Answer
 14 at 5-6.)

15 "Plea agreements are contractual in nature and are measured by contract law standards." *United*
 16 *States v. De la Fuente*, 8 F.3d 1333, 1337 (9th Cir. 1993). The Due Process Clause of the federal
 17 Constitution confers on a defendant the right to enforce the terms of a plea agreement. *Brown v. Poole*,
 18 337 F.3d 1155, 1159 (9th Cir. 2003). "[W]hen a plea rests in any significant degree on a promise or
 19 agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such
 20 promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971).

21 Salgado pleaded guilty to second degree murder. In exchange, he received an indeterminate term
 22 of fifteen years to life. (Lodgment Nos. 1, 2, 4.) There is no indication the plea agreement included any
 23 promise that Salgado would serve less than the maximum life term or that facts of the crime other than
 24 those agreed to in his plea agreement or the plea hearing would not be considered when determining
 25 whether he would be granted parole. Consequently, the BPH's denial of parole cannot be characterized
 26 as a "breach" of Salgado's plea agreement. The state court's decision was therefore neither contrary
 27 to, nor an unreasonable application of, clearly established Supreme Court law. *See Williams*, 529 U.S.
 28 at 412-13.

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2 **IV. CONCLUSION**

3 Based on the foregoing reasons, the undersigned Magistrate Judge **RECOMMENDS** that the
4 Petition for Writ of Habeas Corpus be **DENIED**. This report and recommendation is submitted to the
5 United States District Judge assigned to this case pursuant to 28 U.S.C. § 636(b)(1).

6 **IT IS ORDERED** that no later than **March 8, 2010**, any party to this action may file written
7 objections with the Court and serve a copy on all parties. The document should be captioned
8 “Objections to Report and Recommendation.”

9 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with the Court and
10 served on all parties no later than **March 22, 2010**. The parties are advised that failure to file objections
11 within the specified time may waive the right to raise those objections on appeal of the Court’s order.
12 *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

13 **IT IS SO ORDERED.**

14 DATED: February 16, 2010

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16 Hon. William McCurine, Jr.
17 U.S. Magistrate Judge
18 United States District Court
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